



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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November 20, 2015

Mr. Jason Cherkis
The Huffington Post
1750 Pennsylvania Ave., NW, Ste. 600
Washington, DC 20006

Re: Formal Complaint 15-FC-282; Alleged Violation of the Access to Public Records Act by the Office of the Governor

Dear Mr. Cherkis,

This advisory opinion is in response to your formal complaint alleging the Office of the Governor ("Governor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Governor has responded via Mr. Mark Ahearn, Deputy General Counsel. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 21, 2015.

BACKGROUND

Your complaint dated October 20, 2015, alleges the Office of the Governor violated the Access to Public Records Act by not providing a privilege log pursuant to a request.

On June 24, 2015, you submitted a request for public records to the Governor's Office for emails relating to the HIV outbreak in Scott County. On September 22, 2015, you received a letter stating all of the emails were being withheld as either deliberative or attorney-communication. You take exception to this blanket statement, as you have no way of determining whether the exemptions to disclosure were proper or whether some of the materials could be separated as non-exempt information.

The Governor's Office responded to your complaint with a slightly different version of events. While it concedes there is a batch of emails claimed to be deliberative or attorney-client privilege, it also contends there is still an ongoing search for emails which may or may not be disclosable. The Governor's Office argues that the APRA does not require a public agency to provide a detailed description of each and every piece of communication withheld under a statutory exemption to disclosure.



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ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See Ind. Code § 5-14-3-1*. The Office of the Governor is a public agency for the purposes of the APRA. *See Ind. Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the Governor’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Ind. Code § 5-14-3-3(a)*.

It is not uncommon for public agencies to create a privilege log when denying public records requests. This log is akin to a device used to separate privileged materials in a civil lawsuit. It is also required under the Federal Freedom of Information Act. While this is sometimes practical, it is not required under the Indiana Access to Public Records Act. When denying a public records request, a public agency must state the statutory justification for withholding the record as well as the name and title of the individual making the decision to withhold. *See Ind. Code 5-14-3-9(d)*. Nothing in the APRA contemplates any more detail than this.

You cite an Informal Inquiry response by Former Indiana Public Access Counselor Karen Davis as authority requiring such a detailed statement, however, Counselor Davis also cited to a prior Formal Complaint under which Former Indiana Public Access Counselor Counselor Anne O’Connor opined:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any court action taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” to the court. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. **There is no authority under the APRA that**



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required the [public agency] to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court.

Opinion of the Public Access Counselor 01-FC-47 (emphasis added).

Because this matter is not before a Trier of fact, the Governor's Office is under no obligation to provide a public records requestor with a more detailed statement than what is mandated by Ind. Code 5-14-3-9(d). The Office of the Public Access Counselor does not solicit an *in camera* review of documents to determine what is disclosable and what is not. Without such a review, I cannot state conclusively whether the exemptions cited are appropriate. That is a determination best left to a trial court. Similarly, this Office cannot state whether there is material which can be separated pursuant to Ind. Code 5-14-3-6(a):

If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.

The Governor's Office appears to have taken this statute under consideration and determined the entirety of materials withheld fall under a statutory exception to disclosure. Additionally, it is my understanding from the information submitted the Governor's Office continues to evaluate any communication to determine whether there are more records which may be responsive to your request. It seems as if this matter is still pending and it is my sincere hope, to the extent they exist, you receive any non-privileged communications as quickly and efficiently as possible.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Office of the Governor did not violate the Access to Public Records Act.

Regards,



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A handwritten signature in black ink, appearing to read "LH Britt", with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Mr. Mark Ahearn, Esq.